Full Service Beverage Company of Colorado *and* Frank Louis Sample and International Brotherhood of Teamsters, Local No. 435. Case 27–CA–15359

August 7, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On May 29, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Full Service Beverage Company of Colorado, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the June 13, 1997 unlawful written warning, suspension, and discharge of Frank Sample, and within 3 days thereafter notify this employee in writing that this has been done and that the written warning, suspension, and discharge will not be used against him in any way."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue written warnings, suspend, discharge, or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters, Local No. 435 or any other union.

WE WILL NOT suggest to employees that the Company's proposed MORE committee would be an alternative to union representation.

WE WILL NOT ask employees to attend union meetings in order to report to us what occurred at the meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days form the date of the Board's Order, offer Frank Sample full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Frank Sample whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the June 13, 1997 unlawful written warning, suspension, and discharge of Frank Sample, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the written warning, suspension, and discharge will not be used against him in any way.

FULL SERVICE BEVERAGE COMPANY OF COLORADO

Chet Blue Sky, Esq., for the General Counsel.
Gustav Auchey, Esq. and *Brian Meegan, Esq.,* for the Respondent.
Linda Cote, Esq., for the Union.[1]

DECISION

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[2] In the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the Order to conform more closely to the complaint and the judge's conclusions as to actions taken against Sample. See sec. VIII of the judge's decision.

[1] The caption of this case was amended at the hearing to reflect that Teamsters Local 435 (the Union) was also a Charging Party.

[2] 29 U.S.C. § 158 (a)(1) and (3).

[3] The case was heard at Denver, Colorado, on March 16–20, 1998. All dates refer to 1997 unless otherwise stated.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates a nonunion beverage distribution business in the Denver, Colorado area. At the relevant times the Respondent's supervisory hierarchy consisted, in part, of Director of Distribution Walter Apodaca, Driver Supervisor James Ferris, and Human Resources Manager Karen Purre.

III. SAMPLE MAY 7 DISCIPLINE

In April 1997 the Respondent was having difficulty hiring enough drivers to fill its needs. Employee Frank Sample started work for the Respondent on April 18. Sample was hired as a truckdriver and was paid an hourly wage when he started. On May 7 the Respondent gave Sample a written warning because he was not answering his beeper pages, having his wife call in to report his absence for the day, and an unspecified "attached complaint." The notice further warned that he must comply with company regulations or risk further action.

In late April the Respondent notified its drivers that their pay would be changing from an hourly rate to a salary. When Sample and other drivers received their first paychecks under the salary system they were dissatisfied with the change.

IV. SAMPLE JUNE 3–4 DELIVERY PROBLEMS

On June 3 Sample did not make all of his scheduled deliveries. He was chastised by Apodaca for this and told of the importance of completing his route. On June 4 Sample missed 11 of his scheduled 25 delivery stops. Sample was not spoken to immediately about this problem because he left the Respondent's premises before the missed deliveries were noted by supervision. Sample worked June 5 without incident. A written warning was prepared for Sample outlining his missing deliveries. (G C Exh. 9.) It is unclear exactly when the warning was actually written. Although it is dated June 4, it was not signed by Apodaca until June 6. The warning was not shown to Sample until June 13. The Respondent asserts this was because supervision was unable to connect up with Sample in the meantime. As recited below, I do not credit this explanation.

V. SAMPLE'S UNION PETITION

On the evening of June 5 Sample used his home word processor to prepare a multipage document relating to union representation for the drivers. This document included a signup list for drivers to express their interest in meeting with a union representative. Sample took the document to work with him when he reported at 4:30 a.m. on the morning of June 6. He posted it on the bulletin board in the driver's room and left on his delivery route.

Supervisor Ferris was soon made aware of Sample's union posting. He made a copy of some of the pages, including a recitation of its purpose and the signup list. Sample's name was the first signature on the list. Ferris, lead driver, Ken Hitchcock, and Apodaca met with Human Resources Manager Karen Purre, when she arrived at work that morning. Part of their meeting was overheard by Purre's assistant, Helen Elizabeth Treadway. I credit Ferris' testimony as to what was said during this meeting as he had an excellent recall and related events without embellishment. Ferris recalled Apodaca asking Purre what they needed to do about "this guy." Purre asked who he was talking about. Ferris said he was guessing that Frank Sample was responsible for the posting because his name was the first on the signature page and he was the only driver with access to a computer. Purre asked if anyone had seen him post it and was told they had not. Apodaca said, "We want to write Frank's ass up for any wrongdoings." Purre said they needed to, "document, document, document" everything. Purre testified that, "I had, all of a sudden, this overwhelming thing I had to deal with." She also told the supervisors that anything Sample was written up for needed to be work related and could not involve union activities. Ferris stated that they did not need his union activities because his work history "screwed himself." On June 6 Apodaca signed Sample's warning dated June 4.

Ferris recalled that he had a driver's status meeting with Apodaca sometime between June 6 and Sample's June 20 discharge. Apodaca was angry about Sample's performance. At the conclusion of the meeting Apodaca told Ferris to get rid of Sample because they could not afford to have any "troublemakers" like him.

VI. SAMPLE'S TELEPHONE CALLS TO REPORT ABSENCES

On June 10 Sample called the Respondent's telephone number to report that he was ill and would not be at work. He kept getting the answering service before his 4:30 a.m. starting time. He tried to get another number to call but the answering service would not give him one. He finally talked to Hitchcock at about 8:30 a.m. and told him he would not be in that day. He complained to Hitchcock that he had trouble reaching the Respondent that early in the morning. He recalled Hitchcock told him that it was acceptable to call the answering service and leave a message if he was not coming to work. Hitchcock denied ever stating this. Sample was not disciplined for calling in after his starting time on June 10. On June 11 Sample again reported sick, this time leaving a message with the answering service at 4:38 a.m. Respondent's records confirm Sample called to report his absence on June 11. The Respondent asserts, however, that employees are instructed to contact supervision directly to report their absence.

On the morning of June 11 Apodaca telephoned Ferris and learned that Sample was a "no-show" for the day and they had not heard from him. According to Apodaca he then instructed Ferris to terminate Sample. The Respondent's records and conduct, however, contradict this testimony. Instead of terminating Sample a written warning was eventually prepared for Sample. Although Sample worked June 12 and 13 he was not terminated. On June 13 Hitchcock showed Sample the warning dated June 4. He asked Sample to sign the warning but he refused. No other warning was given to Sample nor was discipline discussed with him this day. The Respondent did, however, prepare at some point a written warning dated June 11. This warning chastised Sample for leaving a message with the answering service rather than directly speaking to supervision. That warning concludes: "If Mr. Sample has any more mishaps he will be terminated." (GC Exh. 12.) Sample was not shown this warning until after his discharge.

VII. SAMPLE'S SUSPENSION AND DISCHARGE

Sample reported to work June 16 but there was no work assigned to him and he was sent home. That evening he received a phone message from Hitchcock telling him to report at 9 a.m.

On June 17 and he would be assigned to pick up displays. When Sample reported to work he was called to a meeting with Ferris and Purre. Purre wanted to know why he had not signed the June 4 warning which Hitchcock showed him on June 13. He said he did not agree with it. Purre then questioned why Sample had not called in on June 11. He protested that he had left a message with the answering service. Purre said there was no record of this phone call. Purre then told Sample he was being placed on a 3-day suspension because he did not call in on June 11 and because he had refused to sign the June 4 warning notice.

On June 19, the day before his suspension was to end, Sample went to Respondent's facility. He circulated another petition and letter among the employees seeking their interest in meeting with a union representative. Before leaving the plant, Sample gave a copy of the letter and other documentation to supervisor Ferris. This documentation explained to management the employees' interest in union activity and cautioned against violating their rights.

On the morning of June 20 Sample and some union representatives passed out union handbills at the plant before his starting time. Sample's handbilling was observed by supervisory personnel. When Sample went to work that morning he was told that he had been terminated but was not given an explanation of the reasons. He returned to the plant on June 23 and demanded to know specifically why he was discharged. Purre told him it was because of his four writeups. Sample protested he had not seen four warnings. Purre showed him warnings dated May 7 and June 4, 11, and 17. Sample said he had never seen the June 11 and 17 warnings. Sample requested copies of the warnings but Purre refused to give them to him. The June 17 warning notice concludes that the suspension was because Sample failed to adhere to the June 4 warning. (GC Exh. 13.) The Respondent does not contend that it had shown the June 11 or 17 warnings to Sample before June 23.

VIII. CONCLUSIONS AS TO ACTIONS TAKEN AGAINST SAMPLE

The Government alleges that the warning given Sample on June 13, his June 17 suspension, and his June 20 discharge are violations of the Act. The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); and *Presbyterian/St. Luke's Medical Center***,** 723 F.2d 1468, 1478–1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

The Respondent had knowledge of Sample's union activity, having seen his name on the June 6 signup list. Apodaca was clearly distressed by Sample's union efforts. He wondered aloud what should be done with Sample and concluded they should, "Write his ass up." The ensuing written warnings detailing Sample's work deficiencies were an effort to document his poor performance to justify his termination. I find that the Government has established the elements of knowledge, timing and, based on the record as a whole, including the violations set forth below, union animus sufficient to establish unlawful motivation for Sample's discharge.

The Respondent in defense of the discharge has demonstrated that Sample did not always properly perform his work. Yet the Respondent was in need of drivers and was tolerant of his job performance until his union activity became known. At that point the Respondent engaged in a heightened effort to justify discharging Sample by "writing his ass up." The June 4 written warning was not shown to Sample for 9 days after it was allegedly prepared. The June 11 warning was a further effort to document Sample's transgressions, but conditioned his possible termination on his engaging in "any more mishaps." Sample was not shown the June 11 or 17 employee warning notices until after his discharge. Between June 11 and Sample's June 17 suspension it is undisputed that Sample did not engage in further "mishaps." Sample did, however, circulate a union petition the day before his discharge and put Ferris on notice he had done so. On the day of his discharge Sample distributed union literature at the plant gates.

The Respondent has failed to adequately explain why Sample was discharged despite the wording of his June 11 warning notice that he would be terminated if he had additional "mishaps." I infer from the record as whole that the reason Sample was suspended and discharged was his continued union activity. I find that the Respondent has failed to persuasively show that it would have taken the same action against Sample in the absence of his union activities. Therefore, I conclude that the June 13 written warning, and Sample's suspension and discharge are each a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.[4]

IX. DISCUSSION OF THE "MORE" COMMITTEE

On June 19 a group of employees was in the drivers' room discussing complaints about their working situation. Apodaca joined the discussion and told the drivers if they wanted to discuss their problems they should individually come to see him. Driver Christine Howland, Supervisor James Ferris, and Apodaca had a conversation in the office shortly thereafter. Howland and Ferris complained about working conditions including the turnover in drivers, long hours, and too many stops expected of the drivers. Apodaca sent Ferris out of the room and continued the conversation with Howland. Apodaca said that he had been a union steward at one time and the Union was going to hurt the Respondent more than it was going to help. Howland told him the Union was coming in and he was going to lose. Apodaca then showed some papers to Howland and said he had an alternative that he had proposed to upper management that he thought would be put into effect. The papers

[4] The written warning shown Sample on June 13 was part of an effort to unlawfully justify his discharge. Nothing in this decision, however, shall be construed to preclude the Respondent from nondiscriminatorily disciplining Sample because of his failure to properly make deliveries.

concerned a proposal for a MORE (maintaining our reputation for excellence) committee of employees that meet each month to express workers' concerns. Apodaca said that Howland could be the drivers' representative on the committee. Apodaca said he would have a meeting with drivers to discuss matters and Howland could tell the drivers, when she saw them in the morning, what they had discussed.

Apodaca admitted discussing the MORE committee with Howland. He further contended that he considered the committee a dead issue since it had earlier been received without enthusiasm by higher management. Apodaca's testimony did not satisfactorily explain why he then bothered to bring the idea of the committee to Howland's attention as an alternative to union representation. I credit Howland's testimony as to what Apodaca said concerning the committee. I find that by proposing the MORE committee the Respondent intended to interfere with, restrain and coerce employees in their decision concerning union representation. I further find that Apodaca's discussion of the committee with Howland was a violation of Section 8(a)(1) of the Act. *Modern Merchandising*, 284 NLRB 1377, 1379–1380 (1987).

X. ASKING HITCHCOCK TO ATTEND UNION MEETINGS

Ferris recalled that in June he was discussing the union interest of employees with Apodaca when the subject of a union meeting came up. Apodaca suggested that Ferris go to the union meeting. Ferris said they would not let him in because of his supervisory status. Apodaca then told Ferris to ask leadman Ken Hitchcock to go to the meeting and report what he learned to the Respondent. Apodaca denied ever telling Ferris to have Hitchcock attend union meetings. Based on the demeanor of these witnesses, I credit Ferris' testimony.

Ferris asked Hitchcock to attend union meetings and report what he learned. Hitchcock denied ever being solicited by Ferris to attend union meetings. He did admit, however, that he had in fact attended union meetings and discussed with management, on his own volition, what happened at the meetings. I found Hitchcock an unconvincing witness and I conclude that he was in fact solicited by Ferris to attend union meetings and report what he learned to the Respondent. I further find that Respondent's solicitation of an employee to engage in surveillance of union meetings on its behalf is a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Full Service Beverage Company of Colorado is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local No. 435 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

ORDER[6]

The Respondent, Full Service Beverage Company of Colorado, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suggesting to employees that the Respondent's proposed MORE committee would be an alternative to union representation.

(b) Asking employees to attend union meetings in order to report to the Respondent what occurred at the meetings.

(c) Issuing written warnings, suspending, and discharging employees because they engaged in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Frank Sample full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Frank Sample whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the June 4, 1997 unlawful written warning, suspension, and discharge of Frank Sample, and within 3 days thereafter notify this employee in writing that this has been done and that the written warning, suspension, and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] The Union's unopposed posthearing motion to correct the record is granted. It is ordered that the exhibit file be corrected to reflect that the notes of a June 19, 1997 event signed by witness Christine Howland are the correct U. Exh. 4.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1997. *Excel Corp.,* 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.